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15 April 2019

ICC fails victims in Afghanistan

"Interests of justice" rationale rings hollow

The Hague/New York — Political considerations have overridden legal precedents and the concerns of victims in Afghanistan, the Coalition for the International Criminal Court (CICC) said today.

On 12 April 2019, judges of the International Criminal Court (ICC) rejected a request by Prosecutor Fatou Bensouda to open an investigation into alleged war crimes and crimes against humanity committed in Afghanistan since 1 May 2003.

The request, filed in November 2017, concerned crimes allegedly committed by the Taliban and other armed groups and Afghan military forces since 1 May 2003.¹ The Prosecutor also alleged that similar crimes had been committed at the hands of United States' (US) military forces and the US Central Intelligence Agency (CIA) in Lithuania, Romania, and Poland since 1 July 2002.

While the decision of the Pre-Trial Chamber (composed of Judges Antoine Kesia-Mbe Mindua, Judge Tomoko Akane, and Judge Rosario Salvatore Aitala) did acknowledge that international crimes have been committed in Afghanistan, it concluded that an investigation "would not serve the interests of justice" – potentially tolling the death knell for an end to impunity in a country that has awaited justice for more than 15 years.

Critics of the decision have questioned whether the Chamber even has the authority to analyze "interests of justice" as the Prosecutor used her *proprio motu* power to request an investigation, suggesting that the PTC acted *ultra vires*.

"We are extremely disappointed. The ICC judges speak of pressure and challenges, but victims in Afghanistan don't have to be told that seeking justice is a challenge and that investigation would only be the beginning," said **Guisso Jahangiri, Executive Director of Armanshahr/OPEN ASIA, Vice-President of FIDH, and founding member of the Afghanistan Transitional Justice Coordination Group.**

"As an Afghan and the family of a victim of war, I am shocked and disappointed to hear that ICC rejected the request to open an investigation into Afghanistan. The ICC's judges' decision is simply a miscarriage of justice and a blow to the demand

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¹ "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan." https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF



of millions of victims of war for justice in Afghanistan,” said **Horia Mosadiq, Member of the Afghanistan Transitional Justice Coordination Group.**

Respecting and upholding the independence of the ICC judges and the ICC Prosecutor is fundamental to the mandate of the Coalition for the ICC.

“Our global membership is expressing shock that the ICC did not authorize the request, and is stating that the arguments against authorization fly in the face of the founding tenets of the Court as articulated in the Preamble of the Rome Statute: ‘ending impunity and preventing mass atrocities with a view to achieving peace, security and the well-being of the people,” said **William R. Pace, Convenor of the Coalition for the ICC.** “Our members believe the Pre-Trial decision should be appealed and modified,” **Pace** added.

Since 2009, fighting in Afghanistan has killed 24,841 civilians and injured 5,347, with 2016 proving the deadliest yet for children, according to the UN.² International crimes including murder, persecution, gender crimes, intentionally directing attacks against humanitarian personnel and against protected objects, conscription of children, and sexual violence have allegedly taken place throughout this period.

“Despite continuous requests from Afghan civil society and human rights organizations, it is very deplorable news that the ICC judges rejected the Prosecutor’s request to open an investigation into the situation in Afghanistan, particularly considering the increasing number of civilian casualties and war crimes still being committed in the country. We hope the ICC judges reconsider their decision,” said **Dr. Daoud Ali Najafi, Director, Afghanistan Organization for Human Rights and Peace (AOHRP).**

The ICC judges’ decision cited “subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future.”³

“It is concerning that a court of last resort, one that is supposed to be a guarantor of independent justice, rejects the opening of an investigation into the gravest crimes in Afghanistan. All these parties involved in the conflict in Afghanistan: the

² “Record number of children killed in Afghanistan conflict in 2016, U.N. says.” L.A. Times. 06 February 1017. <https://www.latimes.com/world/la-fg-afghanistan-report-children-killed-20170206-story.html>

³ “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan.” https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF



government, the Taliban, the U.S. – all have committed crimes and should be investigated,” continued **Guissou Jahangiri**.

The decision also stated that an investigation into the situation in Afghanistan “would inevitably require a significant amount of resources. In the foreseeable absence of additional resources for the coming years in the Court's budget, authorizing the investigation would therefore result in the Prosecution having to reallocate its financial and human resources; in light of the limited amount of such resources, this will go to the detriment of other scenarios.”⁴

“That these ICC judges appear to be deciding the future of investigations and cases based apparently on the policies of the small minority of states pushing for “zero nominal growth” budgets for the ICC - or similar budget cutting proposals - despite obvious needs for an increase in Court funding given its far-reaching mandate, is extremely worrying,” **Pace continued**.

The decision by the Pre-Trial Chamber of the ICC has left many wondering not only whether any justice for these alleged crimes will be possible, but also what the future holds for Afghanistan. “We are very concerned that the decision of the ICC judges will lead to immunity being granted to Taliban forces in Afghanistan. The Afghan people are even more afraid of their future given the now very real possibility of the government sharing power with a militant group that is accused of committing massacres and which justifies its crimes by a radical ideology,” said **Jalil Benish, Afghanistan Watch**.

Article 15.5 of the Rome Statute does provide for the Prosecutor to submit a new request should “new facts or evidence regarding the same situation” emerge. However, political wrangling around the situation may stymie future attempts by the Prosecutor as well.

“Today's decision is not based on the evaluation of legal and factual evidence, but on political and practical considerations of the Court itself, seemingly not even considering the legal and factual reality of victims in Afghanistan. The lesson we draw from this is that apparently those who are powerful enough can pressure this international court of last resort into handing them impunity,” concluded **Guissou Jahangiri**.

Indeed, the judges’ decision comes on the heels of various moves by the Trump administration against the ICC. In September 2018, U.S. National Security Adviser, John Bolton, had warned that if the Afghanistan investigation advanced, the ICC and ICC officials would face “consequences,” including arrest, travel limitations and organizational and individual economic sanctions.

⁴ “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan.” https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF



On 15 March 2019, U.S. Secretary of State, Mike Pompeo, made good on that threat, announcing a policy of U.S. visa restrictions on ICC personnel directly involved in investigations of U.S. citizens for war crimes and other abuses allegedly committed in the context of the conflict in Afghanistan. The announcement further extended restrictions on individuals requesting or furthering such an investigation.

At the time of the visa restrictions announcement, Richard Dicker, International Justice Director at Human Rights Watch, stated, “the U.S. decision to put visa bans on ICC staff is an outrageous effort to bully the Court and deter scrutiny of US conduct.”⁵ “Trump administration threats against the ICC mask the real problem, the failure of US authorities to address past torture and other abuses by the CIA and US armed forces...This is precisely the ICC’s role, to deliver justice for victims when all other doors are closed,” he continued.

That policy was put into practice on 5 April 2019 when U.S. authorities revoked the visa of Prosecutor Bensouda.

Please refer to the Coalition’s website for further views from civil society on this development: www.coalitionfortheicc.org

About the ICC

The ICC is the world’s first permanent international court to have jurisdiction over war crimes, crimes against humanity, and genocide. Central to the Court’s mandate is the principle of complementarity, which holds that the Court will only intervene if national legal systems are unable or unwilling to investigate and prosecute perpetrators of genocide, crimes against humanity and war crimes.

There are currently eleven active investigations before the ICC: Burundi; the Central African Republic I & II; Democratic Republic of Congo; Darfur, Sudan; Kenya; Libya; Uganda; Côte d’Ivoire; Mali and Georgia. The ICC has publicly issued 34 arrest warrants and nine summonses to appear. Three trials are ongoing. There have been three convictions and three acquittals. Ten preliminary examinations currently ongoing, including into situations in Afghanistan, Bangladesh/Myanmar, Colombia, Gabon, Guinea, Iraq/UK, Palestine, Nigeria, Ukraine, and Venezuela. The OTP has concluded preliminary examinations relating to Honduras, the Republic of Korea and the Comoros referral, declining in each case to open an investigation.

About us

The Coalition for the International Criminal Court is a global network of civil society organizations in 150 countries fighting for justice for victims of genocide, war crimes, crimes against humanity, and the crime of aggression through national courts and the International Criminal Court. www.coalitionfortheicc.org

⁵ “US Threatens International Criminal Court.” Human Rights Watch. 15 March 2019. <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>